

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
INDIANA MICHIGAN POWER COMPANY)	
for authority to reconcile its energy optimization plan)	
costs associated with the plan approved in Case)	Case No. U-17283
No. U-16673 and for the reconciliation of certified)	
net loss revenues.)	
_____)	

In the matter of the application of)	
INDIANA MICHIGAN POWER COMPANY)	
for authority to reconcile its energy optimization plan)	Case No. U-17603
costs associated with the plan approved in Case)	
No. U-16673 and for the reconciliation of certified)	
net loss revenues.)	
_____)	

In the matter, on the Commission's own motion,)	
regarding the regulatory reviews, revisions,)	
determinations and approvals necessary for)	Case No. U-18333
INDIANA MICHIGAN POWER COMPANY to)	
fully comply with Public Act 295 of 2008.)	
_____)	

At the September 28, 2017 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER ON REMAND

Background and History of Proceedings

On January 27, 2010, Indiana Michigan Power Company (I&M) filed a general rate case

application in Case No. U-16180. The application relied on a projected 2010 test year and included a proposal for a pilot net lost revenue tracker (NLRT). On October 14, 2010, the Commission issued a final order (October 14 order) approving a settlement agreement which included a rate increase of \$35 million and a pilot NLRT. *See*, October 14 order, Attachment 1, p. 4, ¶ 15.k.

In accordance with the October 14 settlement agreement, I&M filed an application in the company's energy optimization (EO) plan reconciliation on April 29, 2011, in Case No. U-16311. In its application, the company requested authority to reconcile its EO costs and revenues for 2010 and requested authority to include a surcharge to collect net lost revenues for January 2011 through September 2012, as calculated using the method approved in the October 14 order. On January 12, 2012, the Commission issued an order approving a settlement agreement in Case No. U-16311. The settlement agreement deferred consideration of NLRT amounts until I&M's 2012 EO reconciliation proceeding.

On July 1, 2011, while Case No. U-16311 was pending, I&M filed a general rate case, docketed as Case No. U-16801. The company's application relied on a projected 2012 test year and requested a rate increase of \$24.5 million. I&M's application also requested approval of "proposed changes to its terms and conditions for service as well as its proposed rate adjustment mechanisms." The testimony filed with the case, however, did not include or otherwise discuss the NLRT. On February 15, 2012, the Commission issued a final order approving a settlement agreement in I&M's rate case, Case No. U-16801. Neither the order nor the settlement agreement contained any reference to the NLRT.

Shortly thereafter, on April 10, 2012, the Court of Appeals issued its opinion in *In re Detroit Edison Co*, 296 Mich App 101; 817 NW2d 630 (2012). In that order, the Court determined that

the Commission exceeded its statutory authority in authorizing The Detroit Edison Company to adopt a revenue decoupling mechanism (RDM) as part of a contested rate case. The Court based its holding on the contrast between the language in MCL 460.1089(6), which requires the Commission to establish an RDM for gas utilities under certain conditions, and the language in MCL 460.1097(4), which directs the Commission to submit a report on the potential rate effects of electric decoupling. The Court noted that “a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of an RDM for electric providers. If the Michigan Legislature had wanted to do so, it is plain from the language applicable to gas utilities in MCL 460.1089(6) that it could and would have made its intention clear.” *Detroit Edison, supra*, at 110.

On April 27, 2012, I&M filed an application in Case No. U-16739 requesting authority to reconcile its EO revenues and expenses for 2011 and to recover net lost revenues of \$1,137,616 for the same period. On December 20, 2012, the Commission approved a settlement agreement in that case, which, *inter alia*, authorized I&M to collect \$1,137,616 in lost revenues based on the NLRT approved in the October 14 order.

On April 30, 2013, I&M filed an application in Case No. U-17283 requesting authority to reconcile its EO revenues and expenses for 2012 and to recover net lost revenues for the same period. On December 19, 2013, the Commission approved a partial settlement agreement that authorized I&M to reconcile its EO revenues and expenses. The partial settlement agreement provided that the parties would address NLRT issues in briefing. On September 26, 2014, the Commission issued a final order (September 26 order) in which it denied recovery of purported lost revenues on grounds that I&M failed to request or obtain authority to continue the NLRT approved in Case No. U-16180 in its subsequent rate case, Case No. U-16801. In addition, the Commission rejected I&M’s argument that the NLRT was not linked to the revised sales used in

establishing rates in Case No. U-16801. The Commission also raised concerns about adjustments made to I&M's projected sales in Case No. U-16801, to reflect cumulative past losses, which were not reported and therefore could not be validated by other parties to the case. Finally, the Commission tacitly agreed with the Administrative Law Judge that a determination regarding whether the NLRT was an illegal RDM of the type addressed in *Detroit Edison* was unnecessary to the disposition of the case.

On October 24, 2014, I&M filed a petition for rehearing, which the Commission rejected in an order issued on February 12, 2015. On March 13, 2015, I&M filed a claim of appeal in the Court of Appeals.

While Case No. U-17283 was pending, on April 30, 2014, I&M filed an application in Case No. U-17603, requesting authority to reconcile EO revenues and expenses for 2013, as well as approval to collect net lost revenues for the same year. On May 14, 2015, the Commission issued an order (May 14 order) approving the reconciliation of EO revenues and expenses and denying I&M's request for net lost revenues. The Commission found that I&M had not provided any new evidence or arguments that would support reversal of the September 26 order. On September 3, 2015, I&M filed a claim of appeal in the Court of Appeals, which was later consolidated with the company's appeal of the September 26 order. (Court of Appeals Docket Nos. 326405 and 327716).

On April 30, 2015, I&M filed an application in Case No. U-17833, requesting authority to reconcile its EO revenues and expenses for 2014, along with authority to collect net lost revenues for the same year. On November 5, 2015, the Commission approved a settlement agreement and authorized I&M to reconcile its EO revenues and expenses for 2014. With respect to the NLRT, the settlement agreement acknowledged the two pending appeals in the Court of Appeals, and the

parties agreed that the outcome of these appeals in the Court of Appeals or Supreme Court would control the treatment of net lost revenues. Similarly, on May 2, 2016, I&M filed an application in Case No. U-18022 requesting authority to reconcile EO revenues and expenses for 2015. In the settlement agreement, the parties again acknowledged the pending appeals and agreed that the outcome after all appeals were resolved would control the disposition of net lost revenues. Finally, on May 1, 2017, I&M filed an application in Case No. U-18333 requesting authority to reconcile its EO revenues and expenses for 2016, along with approval to renew the NLRT (now Certified Net Lost Revenues (CNLR) tracker) and authorize related deferred accounting.

Discussion

Although the history of proceedings before the Commission appears convoluted, it can be briefly summarized as follows:¹

- I&M requested and received approval to implement an NLRT in Case No. U-16180 beginning after the test year in that rate case ended.
- I&M did not request and did not receive approval for an NLRT in Case No. U-16801, the company's next rate case.
- In Case No. U-16739, I&M received approval to collect net lost revenues associated with the NLRT approved in Case No. U-16180.
- In Case No. U-17283, I&M requested authority to collect net lost revenues that accrued after the company implemented new rates in Case No. U-16801. The Commission denied the request as discussed above. I&M appealed.
- In Case No. U-17603, the Commission again denied I&M's request for net lost revenues on grounds that the company presented no new evidence or arguments to support a reversal of the Commission's decision in Case No. U-17283. I&M appealed.

¹ In addition to the proceedings listed, Case No. U-17756 involves a pending application from I&M for authority to reconcile certified net lost revenues associated with its net lost revenue surcharge, which shall be addressed following the outcome of the remanded issue.

- Subsequent EO reconciliation cases (i.e., Case Nos. U-17833 and U-18022) have resulted in settlement agreements that deferred any decision on the NLRT until all appeals are exhausted.
- As discussed in more detail below, in *In re Application of Indiana Michigan Power Company to Reconcile Costs*, unpublished opinion per curiam of the Court of Appeals issued November 29, 2016 (Docket Nos. 326405 and 327716), the Court remanded Case Nos. U-17283 and U-17603 for further proceedings.

While the issues concerning I&M's NLRT were being litigated, another series of proceedings was ongoing, which culminated in *Enbridge Energy Ltd Pship v Upper Peninsula Power Co*, 313 Mich App 669; 884 NW2d 581 (2015), *lv den* ___ Mich ___; 894 NW2d 605 (2017). In *Enbridge*, the Court explained, "This case raises the issue of whether the PSC possessed the authority to approve a settlement agreement between the PSC staff and the Upper Peninsula Power Company (UPPC) that established an RDM for UPPC for the test year 2010." *Id.* at 670-671. The Court rejected the Commission's claim that the law regarding electric decoupling was uncertain at the time the settlement agreement was approved in Case No. U-16568, holding:

[T]he PSC exceeded its clear statutory authority when it approved the RDM in Case No. U-16568. The fact that the approval was accomplished in the context of a settlement agreement does not transform the PSC's ultra vires act into a legal one. See, e.g., *Timney v. Lin*, 106 Cal.App.4th 1121, 1127-1129, 131 Cal.Rptr.2d 387 (2003) ("[E]ven though there is a strong public policy favoring the settlement of litigation, this policy does not excuse a contractual clause that is otherwise illegal or unjust."). We stress that our holding is based on the fact that reasonable minds could not have disputed the extent of the PSC's authority at the time it approved the settlement agreement.

Enbridge, supra. at 678.

Although the issue before the Court of Appeals in *Indiana Michigan* primarily concerned whether or not the previously-approved NLRT continued after rates were reset in a new rate case, where the NLRT was not raised or reauthorized in the subsequent case, the Court nevertheless found that the cases should be remanded for reconsideration in light of the Court's decision invalidating the RDM approved in *Enbridge*. The Court explained:

The PSC has “only that authority granted to it by the Legislature.” *Mich Elec. Coop. Ass’n v. Pub. Serv. Comm.*, 267 Mich. App 608, 616; 705 NW2d 709 (2005). No statutory authority allows the PSC to approve an RDM for an electric utility. *In re Application of Detroit Edison*, 296 Mich. App at 108–110. The relevant question, then, is whether the definition of an RDM is sufficiently expansive to include the NLRT approved in Case No. U–16180.

The issue whether the NLRT is factually distinct from RDMs approved by the PSC in other cases requires analysis of the specific structure of the NLRT and comparison of that structure to RDMs approved by the PSC. The performance of such an analysis is more suited to the PSC in the first instance. We defer to the administrative expertise of the PSC. *Attorney General*, 237 Mich. App at 88. Moreover, it is apparent that the PSC approves a number of RDMs and similar mechanisms. To have the PSC rule on the validity of the NLRT in light of *Enbridge Energy* would provide guidance for future cases.

Whether these cases continue is entirely dependent on the applicability of *Enbridge Energy*. Therefore, an analysis of the issues raised by I & M is premature.

Indiana Michigan, supra, slip op at 8.

As noted above, the Commission has not addressed the issue of whether the NLRT approved in Case No. U-16180 was an illegal RDM under *Detroit Edison Co* and *Enbridge*. Accordingly, the Commission directs the parties in I&M’s currently pending EO reconciliation proceeding (Case No. U-18333) to address, in addition to EO reconciliation issues, the Court of Appeals’ remand in Case Nos. U-17283 and U-17603.

THEREFORE, IT IS ORDERED that the issue on remand in Case Numbers U-17283 and U-17603 shall be addressed in Case No. U-18333.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscdockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungpl@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

Sally A. Talberg, Chairman

Norman J. Saari, Commissioner

Rachael A. Eubanks, Commissioner

By its action of September 28, 2017.

Kavita Kale, Executive Secretary